



DEPARTMENT OF LABOR

Employment and Training Administration

Wage and Hour Division

20 CFR Part 655

RIN 1205-AB61

Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Delay of Effective Date; Impact on Prevailing Wage Determinations

AGENCY: Employment and Training Administration, Wage and Hour Division

ACTION: Guidance

SUMMARY: The Department of Labor (Department) recently delayed the effective date of the Wage Methodology for Temporary Non-agricultural Employment H-2B Program Final Rule, 76 FR 3452, Jan. 19, 2011 (the Wage Rule) to January 1, 2012. This notice provides guidance to those employers who have received from the Department either a supplemental or dual prevailing wage determinations based on a previous effective date of the new prevailing wage methodology. This guidance is intended to clarify the wage payment requirements for employers participating in the H-2B Temporary Non-agricultural program.

DATES: This guidance is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: William L. Carlson, Ph.D.,
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4312, Washington, DC 20210; Telephone (202) 693-3010 (this is not a toll-free number).
For further information concerning the Wage and Hour Division, contact Mary Ziegler,
Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour
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Individuals with hearing or speech impairments may access the telephone number above
via TTY calling the toll-free Federal Information Relay Service as 1-877-889-5627
(TTY/TDD).

SUPPLEMENTARY INFORMATION:

The Department published the Wage Rule on January 19, 2011, 76 FR 3452. The Wage Rule revised the methodology by which we calculate the prevailing wage to be paid to H-2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification used in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H-2B status. The Department originally set the effective date of the Wage Rule for January 1, 2012. Due to a court ruling that invalidated the January 1, 2012 effective date of the Wage Rule,¹ we issued a Notice of Proposed Rulemaking (NPRM) on June 28, 2011, which proposed that the Wage Rule take effect 60 days from the date of publication of a final rule resulting from the NPRM. 76 FR 37686, Jun. 28, 2011. We published a Final Rule on August 1, 2011, which set the

¹ CATA v. Solis, Dkt. No. 119, 2011 WL 2414555 (E.D. Pa. June 16, 2011).

new effective date of September 30, 2011 for the Wage Rule (the Effective Date Rule). In anticipation of the effective date of the Wage Rule, the Department issued supplemental prevailing wage determinations to those employers who had been granted certification for an H-2B application where work would be performed on or after September 30, 2011.

Both the Wage Rule and the Effective Date Rule were challenged in two separate lawsuits² seeking to bar their implementation. In consideration of the two pending challenges to the Wage Rule and its new effective date, and the possibility that the litigation may be transferred to another court,³ the Department issued a Federal Register notice, 76 FR 59896, Sep. 28, 2011, postponing the effective date of the rule from September 30, 2011, until November 30, 2011, in accordance with the Administrative Procedure Act, 5 U.S.C. 705. Following the postponement of the effective date to November 30, 2011, and in anticipation of the new effective date, the Office of Foreign Labor Certification (OFLC) issued participating employers two simultaneous wage determinations for work to be potentially performed before and after the new effective date of the Wage Rule. The first determination was based on the former regulations that applied up until November 30, and the second determination was based on the new prevailing wage methodology set forth in the Wage Rule, that was to be effective for work performed on and after November 30, 2011.

² See Louisiana Forestry Association, Inc., et al (LFA) v. Solis, et al, Civil Docket No. 11-1623 (WD LA, Alexandria Division); and Bayou Lawn & Landscape Services, et al (Bayou) v. Solis, et al, Civil Docket No. 11-445 (ND FL, Pensacola Division).

³ On September 19, 2011, the plaintiffs in the CATA litigation moved to intervene in the LFA litigation, and also moved to transfer venue over the litigation to the Eastern District of Pennsylvania, the court in which the CATA case remains pending. The plaintiffs' motion to intervene was granted by the U.S. District Court in the Western District of Louisiana on Sept. 22, 2011, but its similar motion in the Bayou litigation before the U.S. District Court in the Northern District of Florida remains pending

On November 18, 2011, the President signed into law the Consolidated and Further Continuing Appropriations Act, 2012, H.R. 2112, 112th Cong. (2011) (enacted). The legislation contains language prohibiting the Department from implementing, administering, or enforcing, prior to January 1, 2012, the Wage Rule. While the Act prevents the expenditure of funds to implement, administer, or enforce the Wage Rule before January 1, 2012, it does not prohibit the Wage Rule from going into effect, which is scheduled to occur on November 30, 2011. When the Wage Rule goes into effect, it will supersede and nullify the prevailing wage provisions at 20 CFR 655.10(b) of the Department's existing H-2B regulations, which were promulgated under Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes; Final Rule, 73 FR 78020, Dec. 19, 2008 (the H-2B 2008 Rule).

Since dates of need are not included in prevailing wage determination requests, it is possible that some of the pending requests with the Department would cover work to be performed before January 1, 2012, and accordingly, that wage would need to be determined in accordance with the 2008 H-2B Rule. However, if the Wage Rule were to go into "effect" on November 30, 2011, we would be legally precluded during the month of December 2011 from issuing prevailing wage determinations under the H-2B 2008 Rule. This result would be directly contrary to Congressional intent as expressed in the Conference Report, "[i]n making prevailing wage determinations for the H-2B nonimmigrant visa program for employment prior to January 1, 2012, the conferees direct the Secretary of Labor to continue to apply the [H-2B 2008 Rule]." H.R. Rept. No. 112-284 (Conf. Rep.), 157 Cong. Rec. H7528 (Nov. 14, 2011). Based on Congressional

intent and to avoid an operational hiatus during the month of December 2011, the Department has published a Final Rule extending the effective date of the Wage Rule to apply to work performed on and after January 1, 2012. See the final rule delaying the effective date of the H-2B Wage Rule, published elsewhere in this issue of the Federal Register.

In light of the recent postponement of the effective date of the Wage Rule until January 1, 2012, the Department is hereby providing notice that the wage determinations previously issued under the Wage Rule will not be effective until January 1, 2012, and will apply only to work performed on or after January 1, 2012. Any employer who has received an H-2B prevailing wage determination in anticipation of either the September 30, 2011 or November 30, 2011 effective dates is not required to pay, and the Department's Wage and Hour Division will not enforce, the wage provided in the prevailing wage determination issued under the Wage Rule for any work performed by H-2B workers or U.S. workers recruited in connection with the H-2B application process until January 1, 2012. Employers are expected to continue to pay at least the prevailing wage as provided in a prevailing wage determination issued under the 2008 H-2B Rule for any work performed before January 1, 2012.

Further, employers who received a supplemental H-2B prevailing wage determination, or a prevailing wage determination issued under the Wage Rule, must pay at least that wage to any H-2B worker and any U.S. worker recruited in connection with the labor certification for work performed on or after January 1, 2012.

SIGNED: at Washington, D.C. this 23rd of November, 2011.

Jane Oates
Assistant Secretary for Employment and Training

Nancy Leppink
Deputy Administrator, Wage and Hour Division

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